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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 200.

THE UNITED STATES,
Appellant,

against

NEDERLANDSCH-AMERIKAANSCHE STOOM-VART MAATSCHAPPIJ (HOLLAND-AMERICA LINE),
Appellee.

Brief for Appellee

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IN THE

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October Term, 1919.

THE UNITED STATES,
Appellant,

against

NEDERLANDSCH-AMERIKAANSCH STOOMVART MAATSCHAPPIJ (Holland-America Line),
Appellee.

No. 200.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

This appeal is taken by the United States from a judgment rendered by the Court of Claims on June 3rd, 1918, in favor of the Holland-America Line, claimant, for the sum of $16,993.50, being the aggregate of sums paid by the claimant at the demand of the United States Immigration Authorities, from May 27th, 1908, to December 9th, 1913, for expenses incurred in the treatment and maintenance in hospitals of alien steerage passengers brought to the United States on the claimant's vessels, and temporarily removed

from such vessels pending examination as to their right to enter the United States. All such aliens were finally admitted (R., 5-7).

The claimant contended: (1) that no legal liability rested on it to pay such expenses; (2) that the claimant was under no contract obligation to make such payments; (3) that there was no consideration for the payments made by claimants; (4) that such payments were made under compulsion and duress and were not voluntary, and (5) that Congress had provided an ample fund (known as the Head Tax) for the payment of such expenses, and that such expenses were chargeable against said fund (R., 1-4).

Facts.

Since the passage of the Immigration Act of 1891 the passenger steamship lines have contended that, under the immigration laws, they were not liable for the expenses of hospital treatment and maintenance of aliens who were legally brought to the country, but who had to be temporarily detained on account of illness before being ultimately admitted. The Treasury Department held over the steamship lines continually the threat that if payments were not made for the expenses incurred by the United States for such treatment and maintenance, aliens would not be removed from the vessels, but would be kept on board and treated there, thus turning the passenger vessels into hospitals and seriously crippling the business of the steamship lines. The lines, though

protesting at times, paid these expenses for a number of years, until, in 1908, the Cunard Steamship Company appealed a case, known as the *Toth* case, to the Secretary of Commerce and Labor, who decided in March, 1909, that the company was not liable for the expenses. The claimant-appellee, and other lines, thereupon ceased paying such bills for aliens legally brought, although paying without question bills for immigrants ultimately deported, and notified the Commissioner of Immigration that their action was taken because of the decision in the *Toth* case. For a few months after that decision the Government did not apply its usual compulsion to exact payment of the hospital bills, but in October, 1909, a ruling was made by the Treasury Department to the effect that such expenses were not a proper charge against the appropriation for the expense of regulating immigration. Thereafter payments were exacted as before the *Toth* case arose, under threats of detaining passengers on the vessels. All the payments made by the claimant and for which reimbursement is sought in this suit were made under compulsion of such threats (R., 10-35).

It was for charges accruing during the few months the compulsion on the part of the Government was suspended that the United States brought suit against the claimant in the action, *United States* v. *Holland-America Line,* hereinafter mentioned, resulting in a decision adverse to the Government's contention.

Although no such contention appears to have been made in the Court of Claims, the Attorney General now urges that the suit is one sounding in tort, and that, therefore, the Court was without jurisdiction.

The jurisdiction of the Court of Claims, is, as to demands against the United States, clearly defined by Section 145 of the Judiciary Code, also known as the Tucker Act, of March 3rd, 1887, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidaed or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

POINT I.

The claim sued on is founded both upon a law of Congress and upon a regulation of an executive department of the Government, and the Court of Claims clearly had jurisdiction.

The appellant's brief should be sufficient to establish this point without further citation of authorities. In that brief it is first asserted that the expense to which the claimant was put and for the reimbursement of which the judgment under review was rendered, was charged and collected under Section 16 of the Act of February 20th, 1907, 34 Stat. 898 (page 1 of Brief), and then it is contended that the claim is not founded upon any law of Congress, but is a claim sounding in tort (page 13).

A case arises under a law of Congress when "the right of either party depends on the validity of an Act of Congress," or when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

Patton v. *Brady*, 184 U. S. 608, 611 (1901) and cases therein cited.

However, the case of *Dooley* v. *United States*, 182 U. S. 222 (1900), is decisive of the question. It was there held that the Court of Claims had jurisdiction over the recovery of duties illegally exacted upon merchandise imported into Porto Rico from the United States. The decision was based on the ground that the case was one founded upon an Act of Congress and therefore within the jurisdiction of the Court of Claims, irrespective of any tortious character of the acts of the Government's representatives in exacting the duties. After expressing the view that 'the words 'not sounding in tort' are in terms referable only to the fourth class of cases," namely, claims for damages, liquidated or unliquidated (page 224), the Court expressly held:

> "But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we thing the case is one within the first class of cases specified in the Tucker Act of claims founded upon a law of Congress" (page 228).

While in the *Dooley* case there was dissent with respect to the right to impose certain of the duties exacted, there was no dissent from so much of the prevailing opinion as held that the Court of Claims had jurisdiction of the claims in question.

In *United States* v. *Lynah*, 188 U. S. 445 (1903), a suit was brought against the United States for damages to lands flooded by water backed up by dams and other obstructions erected by the Government under an Act of Congress. The claim was sustained by this Court. Three justices expressed their opiniin that the jurisdiction of the court could "be supported irrespective of the question of contract or tort under the clause of the Tucker Act which vests the Court of Claims with jurisdiction of 'all claims founded upon the Constitution of the United States, or any law of Congress,' " citing the *Dooley* case.

An examination of the cases cited by the Government as sustaining its contentioa that the Court of Claims was without jurisdiction, shows that they are not in point. They hold, what is not disputed, that Congress has not permitted suits against the Government for mere torts, nor for tortious acts of its representatives, unless the claim is founded upon the Constitution, some law of Congress, or some regulation of an executive department. Attention is not drawn to any decision of this Court holding that when an officer or other representative of the United States, professing to act under a law of Congress, wrongfully exacts money from an individual, and pays the money into the United States Treasury, the United States has not authorized a suit for the recovery of such money.

Considering the cases cited by the Government:

In the *Ball Engineering Co.* case, 250 U. S. 46 (1918), the Government was not a party, but ap-

peared on the argument of the appeal and filed a brief. The action was against a contractor to whom the United States had delivered certain property left by a third party on premises where work had been going on for the Government. The United States gave the second contractor credit for the appraised value of the property, but stipulated that there was no guarantee of title or of peaceable possession, and that the Government would not be liable for any claim on account of the seizure. The decision was to the effect that the contractor who received the property was liable to the owner.

In *Tempel* v. *United State*, 248 U. S., 121 (1918), a claim for damages to submerged land along the Chicago River, caused by Government dredging, was considered. The Government, in prosecuting the work, believed that the land was part of the river bed. It was held that a suit for damages to such land was one sounding in tort, of which the District Court had no jurisdiction under the Tucker Act.

Basso v. *United States*, 239 U. S. 602 (1915), was a case on an appeal by a Spanish subject who sued the United States for damages for arrest and imprisonment on a charge of having smuggled goods into Porto Rico. It was conceded by the appellant that "the cause of action not merely 'sounded in tort,' but is based wholly upon the tortious actions of the agents of the United States" (page 606). It was not in any aspect brought within any of the four classes of cases of which the Court of Claims has been given jurisdiction.

In *United States* v. *Buffalo-Pitts Co.*, 234 U. S. 428 (1913), it was plainly held that there was an implied promise to pay the owner of property taken by the Government for public purposes, the owner's title having been recognized by the Government, and that the case was covered by the Tucker Act.

In *Peabody* v. *United States*, 231 U. S. 520 (1913), a claimant sued for damages for land lying between a fort and the shore because of the fact that guns in the fort could be fired across the land, and had in a few instances been so fired, the claim being advanced that the land had thus been appropriated by the Government. It was decided that there had been no appropriation.

The *Crozier case*, 224 U. S. 290 (1911), was decided with reference to an Act of June 25th, 1910, giving the Court of Claims jurisdiction of suits for infringement of patents.

Harley v. *United States*, 198 U. S. 229 (1904), was the case of a claim for damages for the use of a patented invention, and it was merely held that no contract between the claimant and the Government had been shown.

Russell v. *United States*, 182 U. S. 516 (1900), was a case of damages for the use of a patented invention, and it was held that if the petitioners had suffered any injury, it was through an infringement of the patents and not by breach of contract.

The *Schillinger* case, 155 U. S. 163 (1894), was a suit for damages for a wrongful use by a Gov-

ernment contractor of a patented invention. The transaction on which the claim was based was held to have been "tort pure and simple" (page 169).

In *Langford* v. *United States,* 101 U. S. 341 (1879), decided eight years earlier than the Tucker Act, it was held that the Court of Claims, as then constituted, had jurisdiction only in cases *ex contractu*, an dthat an implied contract to pay did not arise in the case of a tortious taking of lands for public use by an officer of the Government asserting Government ownership.

Gibbons v. *United States,* 8 Wall. 269 (1868), decided only that under the law then existing, the oGvernment was not liable on an implied assumpsit for the torts of its officers committed while in its service and apparently for its benefit.

The cases cited hold no more than that the United States cannot be sued for a tort, unless the case arises, (1) under the Constitution; (2) under a law of Congress, or (3) under a regulation of an executive department.

POINT II.

No liability was imposed by law upon claimant to pay the hospital expenses of aliens ultimately admitted to the United States.

The aliens in question were lawfully brought to the United States; otherwise the authorities would have ordered them deportd. They contracted during the voyage diseases which did not

require their deportation under the immigration laws, but neecssitated their being treated in hospitals until they could be examined as to their right finally to enter the United States.

A. *At common law the carrier would not be chargeable with the expenses incurred by a passenger through contracting an illness not the result of the carrier's negligence.*

Ordinarily it is the duty of a sick person to pay his own expenses. The fact that steerage passengers may have been poor does not create a rule of law requiring sombody else to pay the expenses of their illness. The steamship company had contracted to bring the passengers to the United States, and performed that contract when it had arrived here with them. If upon arrival here they needed medical treatment and hospital service, it was not the duty of the steamship company to provide them with such things, unless it had agreed to do so. No contention is made that the claimant had entered into any such agreement, and it is hardly necessary to cite authorities to show that no common law duty rested upon the carrier to maintain and treat passengers in hospitals after arriving in the Port of New York.

Neither did the bringing of steerage passengers to this country make the carrier a guarantor of the passengers' obligations to pay their own expenses after the voyage is ended.

B. *There was no statutory duty imposed on claimant to make such payments.*

It is not disputed that the Government had the power to impose upon steamship companies the duty of paying such charges, as the price of being permitted to bring immigrants to the United States. Indeed, in 1913, Congress did impose this duty upon steamship lines, but during the period covered by the payments involved in this action, there is no provision of law imposing such liability. Any such provision must clearly be found in the Immigration Act. The Act does provide (Sec. 19) that all aliens brought to this country "in violation of law" shall be deported on the vessel bringing them, and that the cost of their maintenance while on land, as well as the expense of their return, shall be borne by the owner of the vessel. By Sec. 20 it is provided that such aliens as have actually entered the United States "in violation of law, and such as become public charges for causes existing prior to landing," must be deported within three years, and the steamship company which brought them is required to carry them back to the country from whence they came, upon their being brought to the coast of the United States for that purpose.

A search in the Act for any provision imposing expenses upon steamship companies, except in the case of neglect or violation of law, will yield a negative result. There is nothing in the Act imposing liability when the alien is lawfully brought here, as was the case with all the aliens with

whom we are concerned in this action. The primary liability being on the passenger to pay his own expenses, there must be some clear words in the Act of Congress transferring such liability to the carrier. Here the familiar maxim, that a statute in derogation of the common law shall be strictly construed, is very applicable.

In *Sutherland on Statutory Construction*, Sec. 371, it is stated:

> "If a statute creates a liability where otherwise none would exist, or increases a common law liability, it will be strictly construed, and even when it is remediable, must be followed with strictness when it gives a remedy against a party who would not otherwise be liable."

In *Ransom* v. *Williams*, 2 Wallace 313, 317, the Supreme Court states the rule thus:

> "The statute is in contravention of the common law, and hence to be construed strictly."

And Justice Gray in *Northern Pacific R. R. Co.* v. *Whalen*, 149 U. S. 157, 164, said:

> "But this section (imposing liability for maintaining a saloon) creating a new liability, unknown to the common law, is to be strictly construed and is not to be extended beyond the clear import of its terms."

In *Fitzgerald* v. *Quann*, 109 N. Y. 441, 445, Justice Peckham discusses the rule in the following language:

> "* * * The rule itself is too securely and firmly established and grounded in our jurisprudence to be altered, other than by legislation."

We find no case holding that the common law imposed such a duty upon a carrier by water. In the case of *Laubheim* v. *DeK. N. S. Co.*, 107 N. Y. 228, the New York Court of Appeals declined to decide whether the duty of furnishing a surgeon rested on a steamship company, in the absence of some statute. The duty of providing a surgeon and medicines to emigrants was imposed upon steamship companies, in case of vessels carrying more than 50 emigrants, by Congress, in 1882 (Chap. 374, Sec. 5). This act requires the company to furnish a qualified surgeon, provided with surgical instruments and medicines, proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers *during the voyage.*

When does the voyage end? It would seem to end when the vessel reaches port and is placed in a position to permit the passengers to disembark.

The carrier owes the passenger the duty of providing him safe means to land, and of delivering him his baggage and effects, but the voyage is certainly ended. It is the duty of the passenger to get off, and thereafter pay his own expenses for doctors and medicines. The passenger cannot stay on board and insist that he is still a passenger. If he is ill it is his duty to go—or have himself taken—to some suitable place for treatment. His possible poverty does not create a *rule of law* imposing on some one else the burden of paying for his treatment.

In the case of steerage passengers arriving at the Port of New York, they are not actually landed, but are turned over to the Immigration officials.

The Act of February 20th, 1907 (Chapter 1134, Section 16) provides that where a suitable building is used for the detention and examination of aliens, the officials shall there take charge of such aliens, and the transportation companies shall be relieved of their responsibility for their detention until such aliens are returned to them. No aliens are returned to the vessels or to the transportation companies unless they are found ultimately not entitled to land. This contingency does not apply to any of the aliens involved in this action. It is, therefore, made the duty of the Immigration officials to receive alien passengers coming to New York, at the Ellis Island station. This is a duty which the steamship companies have the right to insist shall be performed by the Immigration officials. When a steerage passenger is taken from the ship to Ellis Island, is not the voyage of the vessel bringing him from Europe ended so far as he is concerned? He may be found unfit to land finally, and may be sent back whence he came, but that would certainly appear to be quite another voyage. The ship he came on may be on the other side of the Atlantic before he has been examined and admitted.

As to the duty of the steamship company toward a passenger who is ill, an examination of authorities will show that no more is required at common law than that a sick or aged person is entitled to more care from a carrier than one in good health and strength. This is simply a corol-

lary from the rule, arising under the Law of Negligence, that due care is such as the circumstances require.

We are here concerned with the common law duty of a carrier toward a sick passenger, regardless of the question of restrictions upon immigration, unless such restrictions are legal and change the common law duty of a carrier in such cases. We are inquiring whether there are any restrictions in the Immigration Laws which impose upon a steamship company the duty of paying the debts of those whom it has brought to this country as steerage passengers. If the common law imposes such a liability, this action would never have been brought. We are asking, Where is a statute which changes the common law by making the steamship company liable for these expenses? If the law did not make the Company liable, the Immigration Authorities could not lawfully insist upon payment by the Company, merely because there were restrictions upon immigration. The duty of a passenger to pay his doctor's bill is not changed by the fact that he must show the authorities of the country to which he is going that he is a fit person to be admitted.

No argument can be made that an affirmance of this judgment would result in making immigrants public charges. As the fact has been established that the Head Tax fund was ample to pay all the charges involved in this action, there is no danger on this score. (R., 36.)

Since the year 1913, the steamship companies have had such charges imposed upon them by an Act of Congress, and know where they stand, and can adjust their business under the new liability.

C. *The immigration authorities could not, by adopting rules and regulations, impose such liability upon the steamship companies.*

The imposing of a legal liability upon persons is an act of the law-making power. The administrative branch of the Government might have discretion, within reasonable limits, as to the method of enforcing a law, but it could never enact a rule which creates or destroys a legal liability. This is a government of law and not of bureaucracy. If a steamship line is liable for the maintenance of a passenger after arriving in an American port, it must be because of a liability created by the common law or an act of Congress, or a valid contract. Congress is the national legislature. It exercises power delegated to it by the people, and cannot delegate this power to others.

Delegata Potestas Non Potest Delegari.

By Sec. 22 of the Immigration Act of 1907 the Commissioner-General is authorized to

> "Establish such rules and regulations, prescribe such forms of bond, reports, entries and other papers, and shall issue from time to time such instructions, *not inconsistent with law,* as he shall deem best calculated *for carrying out the provisions of this Act* and for protecting the United States and aliens migrating thereto from fraud and loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid." (Italics ours.)

The only authority the Commissioner has received from the statute is to make rules "not inconsistent with law." He cannot add to the legal liability of the claimant, or change any rule of law imposing liability.

In *United States* v. *United Verde Copper Co.*, 196 U. S. 207-215, the Court used this language:

> "If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

> "Certainly, under the guise of regulation, legislation cannot be exercised."

U. S. v. *George*, 228 U. S. 14-20.

But the exact question of the claimant's liability has been decided in an action brought by the United States against this very claimant, for similar charges which the claimant declined to pay. The payments demanded in that action were for hospital treatment of sixty-six aliens brought to New York in 1909. The action was tried in the United States District Court for the Southern District of New York in May, 1913. Judge Mayer, who tried the case, ruled as follows:

> "A steamship company which brings alien immigrants to the United States in its vessels cannot be held liable under Immigration Act Feb. 20, 1897, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), for the ex-

> pense of medical and hospital treatment given to such aliens who are finally admitted, but who, owing to having contagious diseases either themselves or in their families, must be cared for and the diseased ones cured before they can be properly examined as to their right to entry; but such expense is properly payable from 'Immigrant Fund' created by such act or from the appropriation for 'enforcement of the laws regulating the immigration of aliens' made by Act of March 4, 1909, c. 299, Sec. 1, 36 Stat. 982 (U. S. Comp. St. Supp. 1911, p. 521), and subsequent appropriation acts."

That opinion is reported in *United States* v. *Holland-America Line*, 205 Fed. Rep. 943.

The Circuit Court of Appeals affirmed the judgment of the Court below, in 212 Fed. Rep. 116. At page 118 the Court used this language:

> "This leaves us * * * to inquire whether the Act does impose the obligation to pay these expenses, upon the steamship companies. Concededly it does not do so expressly, and the United States has to rely upon necessary implications."

After considering the various provisions of the Act regarding the question of liability, the Court (at page 119) continued:

> "The Section (16) holds the companies liable for the detention and maintenance of immigrants landed temporarily for examination at places where they remain in the companies' charge. Then it goes on to provide that, where the Government uses a suitable building for detention and examination, the immigrant officials shall take charge of them,

and the companies shall be relieved of responsibility thereafter for their detention until the immigrants are returned for deportation. The buildings on Ellis Island are just such suitable buildings, erected, indeed, by means of the head money tax of $4 paid by the companies on each alien immigrant as required by the Act. So also the State hospitals where immigrants having contagious diseases were at that time sent until they could be removed to Ellis Island for examination were suitable buildings, and the expense so incurred was defrayed by the Government out of the same source. We think the immigration officials and not the defendant were in the language of the Act in charge of the immigrants in question at both places, for all purposes.

"This construction appeals to our sense of fairness. The companies are required to pay head money on the passengers they bring here to provide moneys for defraying the expense of regulating immigration under the act, and no use of such funds could be more appropriate than to apply them to the expenses of aliens pending examination who are rightfully brought here and are eventually admitted. It is stipulated by the parties that these moneys are more than enough in amount to do so after payment of all other expenses. If Congress had thought it just that the companies should pay these charges, we thing it would have said so in express terms, as it did in the case of immigrants brought here in violation of law. It seems to us that the rule adopted by the immigration authorities was not consistent with law and was oppressive because it compelled the companies to pay in order to escape the alternative of having their steamers turned into hospitals and

houses of detention. Such payments were not voluntary. They could not in the nature of things have been resisted."

The judgment of the Circuit Court of Appeals was affirmed in this court.

POINT III.

Claimant was under no contract obligation to pay such expenses.

The Government contends that the claimant had agreed to pay the expenses in question. This contention is based on a letter written by the claimant, July 25, 1894, to the Commissioner of Immigration of New York (R., 12).

This letter contains a promise, on the part of the claimant, to pay the cost of maintenance of alien passengers pending examination at Ellis Island *until the matter should be decided diffcrently by proper authority.*

A. *The alleged promise was made under duress and compulsion.*

It cannot be disputed that it was the threats of the immigration authorities which compelled the claimant to write the letter of July 25, 1894. The stipulated facts show that the threats were made and that they had the expected and desired effect—that of making the steamship companies agree to pay the expenses in question. Indeed the letter was written to the Commissioner of

Immigration in reply to one from him of the day before, plainly showing the determination of the authorities to examine and detain aliens on shipboard unless the companies would agree to pay hospital and maintenance charges (R. 11, 12). An explicit threat had been made in a letter dated July 20, 1894, that examination would be made on shipboard unless the companies would agree to pay such expenses (R. 11).

To understand the full significance of the allegations and proofs on the subject of duress, it is necessary, first, to consider what would be the result for the modern passenger steamer, if the Government insisted upon making the examination of arriving aliens on the ship itself, and refused to remove them to places where they could be properly examined and the sick be treated.

Most immigrants arrive at the port of New York, and it is well known that the Ellis Island establishment at that port was especially constructed and designed as a place where such examination might be held. The arrangement of the Ellis Island plant is, therefore, a fair representation of what the examination requires. Ellis Island, is, in part, a prison, in part a hospital, in part a courthouse, in part a transportation bureau, and in part a special arrangement of runways and enclosures which facilitate examination. One important element in the efficiency of this plant is the fact that it is on an island reached only by boats controlled by the Government, so that no one can either come or go without the Government's consent. A large passenger steamer is not well adapted for use as a place

for the detention or examination of aliens especially when she is lying at her pier. The mere problem of detaining the large number of aliens who sometimes arrive on a ship would make it necessary to manage the ship as a prison for a period of several days together, and, while the ship is thus put on a prison basis, it is at the same time necessary that she be unloaded and loaded again, and that other preparations be made so as to permit her to sail after a few days in port. If, as has been repeatedly threatened by the Government, sick aliens were left on board steamships, the steamship companies would soon be compelled to abandon business. It is not necessary to exercise any imagination in this connection.

A case actually occurred in the business of this claimant where, if fifteen cases of measles, which broke out among children arriving on one of the claimant's vessels had been treated on board, the ship would have been tied up at her pier for two months. That time had elapsed from the arrival of the ship until the last of the children was ready to leave the hospital and be admitted to the United States.

Regular sailings of the claimant's ships under like circumstances would become impossible. No steamship line could refuse to yield to the Government's threats.

Congress recognized this situation in the Immigration Act of 1903, and again in 1907, when it provided that where a suitable building is used for the detention of aliens "the immigration officials shall there take charge of such aliens."

To call an agreement like that set forth in the letter in question a "contract" is farcial.

> "Consent is the very essence of a contract, and if there be compulsion there is no binding consent."

United States v. *Huckabee*, 16 Wallace 414, 431.

The case of *Swift Company* v. *United States* (111 U. S. 22), was almost identical with the present one as regards duress. The question had arisen between the Treasury Department and the manufacturers of matches whether the discount allowed on proprietary stamps, then required, was to be paid in money or in stamps. The treasury officials had ruled that it was to be in stamps, and had declined to deal with the manufacturers on any other basis. A protest was at once made, but had been innefectual. The manufacturers had submitted through a long series of years, and accounts between them and the Treasury Department had been settled as had been required by the ruling of the Department. The Supreme Court subsequently held that ruling to have been erroneous. At page 28 it is said:

> "This was in effect, to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is, whether the receipts, agreements, accounts, and settlements, made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*"

Judge Mayer in the *Holland-America* case (205 Fed. Rep. 943-951), in considering this question used the following language:

"The threats to detain aliens of this character on the vessel were such as to amount practically to duress.

"In these days no steamship company, in justice to its passengers, citizen or alien, and to its freight obligations, could afford to turn its vessels lying at our docks into hospitals and prisons, and, in such circumstances, it is not surprising that the defendant was willing to take any course which would relieve it from such an emergency.

"The immigration officials had no right to order the deporation of these aliens, and if the aliens could have been detained on the vessels while recovering from these non-excludable diseases, some of the vessels would have been detained for weeks—a result neither contemplated nor justified by the statute.

"If the plaintiff (the Government) had no right to enforce payment for the maintenance of these aliens ultimately admitted, then any agreement to pay for such maintenance lacks validity. The agreement relied on by pl[illegible]

> tiff was made under duress and without consideration, and, even if it were admitted (for the sake of the argument) that the agreement of July 25 constituted a contract, that contract became inoperative, after the Act of 1903 became law, and also by its own terms when the Secretary of Commerce and Labor decided the *Toth* case"

B. *The alleged promise expired prior to the arrival of any of the aliens in question.*

The promise in the letter, even if valid for any purpose, was limited to a time when the question in dispute should be decided differently by proper authority. And when the claimant declined to be further bound by the letter, proper authority had already decided the matter twice in favor of the steamship companies. The first decision was an act of Congress, in 1903, and the second, a ruling by the then Secretary of Commerce and Labor, Mr. Strauss, shortly before going out of office, about March 3, 1909.

We will take the Secretary's decision first. This decision was rendered on an appeal taken by The Cunard Steamship Company, Ltd., from a ruling requiring it to pay hospital charges in the case of a family named Toth, arriving on one of its steamers. As reported by the solicitor, Hon. Charles Earle, the secretary reached the conclusion that the companies were not liable for the expenses of maintaining and treating alien passengers in hospitals. He concluded further:

> "The expense of such hospital treatment, moreover, would appear to be a proper charge upon the immigrant fund" (R., 26).

While the ruling was no tfollowed by the Secretary's successors, that can make no difference. Proper authority had decided and claimant notified the Immigration Authorities that its agreement was at an end (R., 26, 27).

Congress must certainly be considered a proper authority in deciding what the law should be as to the question at issue, and in 1903 it enacted amendments to the Immigration Act. By Section 16 of that Act, it was provided that

> "where a suitable building is used for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care."

A building such as the Act contemplates was maintained at the port of New York during all the years when these charges arose (R., 10).

But such a promise as that enacted from the steamship company was one that could be recalled at any time, unless, on account of the principle of estoppel, it should be held binding up to a certain period. If there was a legal liability on the part of the claimants to pay the charges, a contract was superfluous. On the other hand, if claimant promised to continue to do certain things which it was not legally called upon to do, it could not be required to go on continuing these things forever. It could at any time withdraw its promise. The promise being without any

legal consideration, except, possibly, as to acts already done before the promisor notified the Government it would not be further bound by its promise, it could not be held for failure to perform in the future.

C. *If the letter had constituted a legal contract when made, the consideration for it ceased as to any aliens who arrived after the passage of the immigration Act of* 1903.

Even if the Government may have been right in its contention that it could compel the steamship companies lawfully to turn their ships into hospitals, certainly after Congress directed that immigrants should be removed to Ellis Island, there could be no consideration for the alleged ppromise of the claimant to pay the charges in question. It was then clearly the duty of the immigration officials, at least at the port of New York, to remove incoming aliens to Ellis Island.

> "A contract to pay an officer for doing his official duty, or to pay him a sum in addition to his statutory fees, cannot be enforced." (*Studley* v. *Ballard,* 169 Mass. 295.)
>
> "The performance of an act, which a party is under a legal obtligation to perform, cannot constitute a consideration for a new contract."
>
> *Robinson* v. *Jewett,* 166 N. Y. 40; citing authorities.

POINT IV.

These expenses were payable out of the head tax fund, provided by Congress for that purpose, and ample in amount.

The Immigration Act of 1907, in force when these aliens arrived, provided for the collection from the steamship companies of $4 for each immigrant brought, and declared that the money thus collected, "shall be paid into the treasury of the United States and shall constitute a *permanent appropriation* to be called the 'Immigrant Fund' to be used under the direction of the Secretary of Commerce and Labor to defray the expense of regulating the immigration of aliens into the United States." (Italics ours)..

This head tax was first established by the Act of Congress of August 3, 1882 (22 Statutes 214). It was increased in amount by Congress from fifty cents to four dollars as the aggregate expense of regulating the immigration of aliens has increased, but in all subsequent immigration acts it has been provided that the moneys obtained by the Government from this source shall be used to defray the expense of regulating the immigration of aliens.

Shortly after the head tax was established, the power of Congress to create such tax was challenged, and this led to the decision of *Head Money Cases* (112 U. S. 580). The Supreme Court there upheld the power of Congress to impose this tax and based its decision in part on

the declaration of the statute as to the use which was to be made by the Government of the funds so collected. In earlier decisions, the Court had held that the power to impose such a tax did not belong to the States, and if it should now deny the power to Congress to pass such an act, the country would be left without a fund available for this purpose. The Court said on this subject (pp. 590-1):

> "That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This Court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the States."

Various objections to the head tax were raised in the *Head Money Cases* based on the claim that the constitutional limitations on the taxing authority of Congress had been violated. As to this, the Court held:

> "But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is a mere incident to the regulation of commerce—of that branch of foreign commerce which is involved in immigration. * * * The sum demanded of him (the ship owner) is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into

> the treasury, *is appropriated in advance to the uses of the statute, and does not go to the general support of the government.* It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, *for the temporary care of the passengers* whom they bring among us and *for the protection of the citizens among whom they are landed"* (Italics ours). (pp. 595, 596).

It can hardly be necessary to argue that the cost of the hospital treatment of the aliens referred to in this complaint, and the expense of maintaining accompanying relatives, is included in the general expression, "the expense of regulating the immigration of aliens into the United States," to meet which the Head Tax was levied. If an alien arrives in New York suffering from measles, it is a necessary part of the regulation of the immigration of that alien that he should be cared for until he is fit to go about. And if a child, it is only proper that some relative should stay with him, and the expense this entails is a part "of the expense of regulating the immigration of aliens."

The wide reach of the expression "regulating immigration" was commented on by the Supreme Court in the *Head Money Cases.* The Congressional Act of August 3, 1882 (22 Statutes 214), which was there under consideration, covered the whole range of the activity of the Federal Government in dealing with arriving aliens. It was entitled, "An Act to regulate immigration," and on the subject of the meaning of that phrase the Court said:

> "The title of the act, 'An act to regulate immigration,' is well chosen. It described as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources" (p. 595).

It is conceded that the amounts collected from the steamship companies during the years covering the arrival of the aliens in question were more than sufficient to pay all expenses, including the sums paid by claimant and herein sought to be recovered (R., 198).

Throughout the immigration act, it is recognized that the expenses of regulating the immigration of aliens should be borne by the so-called Head Tax, and expenses are not imposed upon the steamship companies, except as penalties for neglect of duty and violation of law.

Throughout the Immigration Act of 1907, wherever expenses are dealt with, they are charged to the immigrant fund, except where the element of punishment is involved. For example: In the latter part of Sec. 19 it is provided that if a person who has been ordered deported is required as a witness, he may be detained, but this must be at the expense of the immigrant fund. Late on in the same section, if an insane alien ordered deported is unable to travel with safety, he may be detained, again at the expenes of the

immigration fund. On the other hand, expenses are repeatedly thrown on the steamship companies, but always for the express or implied purpose of punipshment.

In Sec. 19 aliens brought *in violation of law* must be carried back by the steamship company at its own expense, and the cost of their maintenance while on land must be borne by the company.

In Sec. 20 it is provided that aliens who have actually entered the United States *in violation of law,* and those that have become public charges *for causes existing prior to landing* shall be taken back at the expense of the steamship companies that brought them. Under the Immigration Act of 1903, the steamship companies had also been required to pay one-half the cost of the *inland* transportation, but by the Act of 1907, Congress recognized the principle that expenses must be thrown on the immigrant fund and not on the steamship companies, except in cases where the companies had been remiss. The Committee of the House reported as follows (59th Congress, 1st Session, Report 4, 912):

> "In the case of aliens who have been permitted to land, but subsequently are found to have been unlawfully landed, and therefore, subject to deportation, Section 20 of the present law is construed as placing the cost of deportation on the transportation companies.
>
> "*This appears to be unjust.* The fact that our immigration officials fall into this error of landing such aliens is evidence that the transportation companies have not been remiss in the matter. The cost of deportation

> of aliens who have been landed should be borne by the parties responsible for their illegal entry. If this is impracticable, it should be borne by the Immigrant Fund" (Italics ours).

In accordance with this principle, the Committee amended Section 20 and threw one-half of the cost of inland transportation on the contractor or other person by whom the alien was unlawfully induced to enter the United States, and if that could not be done, the immigrant fund should bear the expense.

These examples show he attitude of Congress to have been that the steamship companies should be put to expense only when they had violated the law.

The provisions of the Immigration Act also show that the Head Tax was intended, among other things, to give financial aid to the immigrants. Section 22 of the Act gives the Commissioner-General power to employ funds raised by the Head Tax for the relief of aliens where they require public aid.

So here we have an ample fund collected under an act of Congress from steamship companies, mostly foreign corporations, and collected to pay the expenses of regulating immigration, declared by the Supreme Court to be a humane provision, highly beneficial to the poor and helpless immigrant, designed for his temporary care on coming to this country, and essential to the protection of our own people. And notwithstanding this ample protection, the steamship companies have been required to pay twice. This view puts the

United States in the unenviable position of having collected from the steamship companies an ample fund to pay for the handling of alien immigrants brought by the companies, and then by threat of ruining their business, having forced the companies to pay again.

It is submitted that Congress cannot have intended to do this, and the Immigration Act of 1907, certainly does not direct this to be done.

POINT V.

The payments having been involuntarily made under compulsion and duress, claimant is entitled to recover the amounts paid.

Money extorted under duress may be recovered without a previous demand therefor.

Cobb v. *Charter,* 32 Conn. 358.

When payment is made to secure a right which the party was entitled to without payment, but could not obtain otherwise, or when it is made on a wrongful demand to save the party from some given mischief that he could not otherwise avoid, it is not voluntary, and may be recovered.

Corkle v. *Maxwell,* Fed. Cases No. 3231.

It is enough that the party pays reluctantly in consequence of an illegal demand, and without being able to regain possession of his property, except by submitting to the payment.

Maxwell v. *Griswold,* 51 U. S. 24.

The payment of an illegal tax is not voluntary, though no protest be made, for the collector is bound to collect the ax, and a protest would be unavailing.

Adams v. *U. S.*, 1 Ct. Cl. 306.

Where the treasury gives to a collector of customs a pperemptory admonition to deposit all money received by him in the treasury, it will not be deemed a voluntary payment as to a portion of the money to which he is entitled.

Ellsworth v. *U. S.*, 14 Ct. Cl. 382.

The payment into the treasury of all fees and collections, made by a collector under the authoritative requirement of the department, is not a voluntary payment, though made without protest, and does not prevent him from suing to recover his percentage of the fees..

Lawson's Case, 14 Ct. Cl. 332.

A superintendent of alien passengers, accompanied by a police officer for the purpose of enforcing obedience to his orders, went on a vessel arriving with alien passengers on board, and demanded head money of these passengers under color of his office, but without lawful authority (the State law under which he acted being unconstitutional); told the master that if he did not comply with the demand, he could not land his passengers, and gave him a receipt for the head money in the name of the commonwealth. The vessel could not have been entered at the Custom House without a certificate from the superintendent that the head money had been

taken care of. *Held*, that the payment was by compulsion and not voluntary, and the owner of the vessel could recover the money, whatever may have been the contract between him and his passengers.

Cunningham v. *Munroe*, 81 Mass. 471.

The case boiled down is this:

A. A steamship company brings immigrant steerage passengers from Europe to New York, a perfectly lawful business.

B. The immigrants contract during the voyage certain ailments, and need treatment after the voyage is completed.

C. It is the legal duty of the immigrants to pay their own expenses for such treatment.

D. The Immigration authorities say to the steamship company, "You shall not pursue this lawful business unless you agree to pay these expenses, and we shall not even allow you to protest against paying."

E. The Company has no alternative but to pay or have its business ruined, and does pay.

In addition, we may here reiterate that the Government has already collected indirectly from the immigrants enough to cover all these expenses.

Respectfully submitted,

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HOWARD MANSFIELD,
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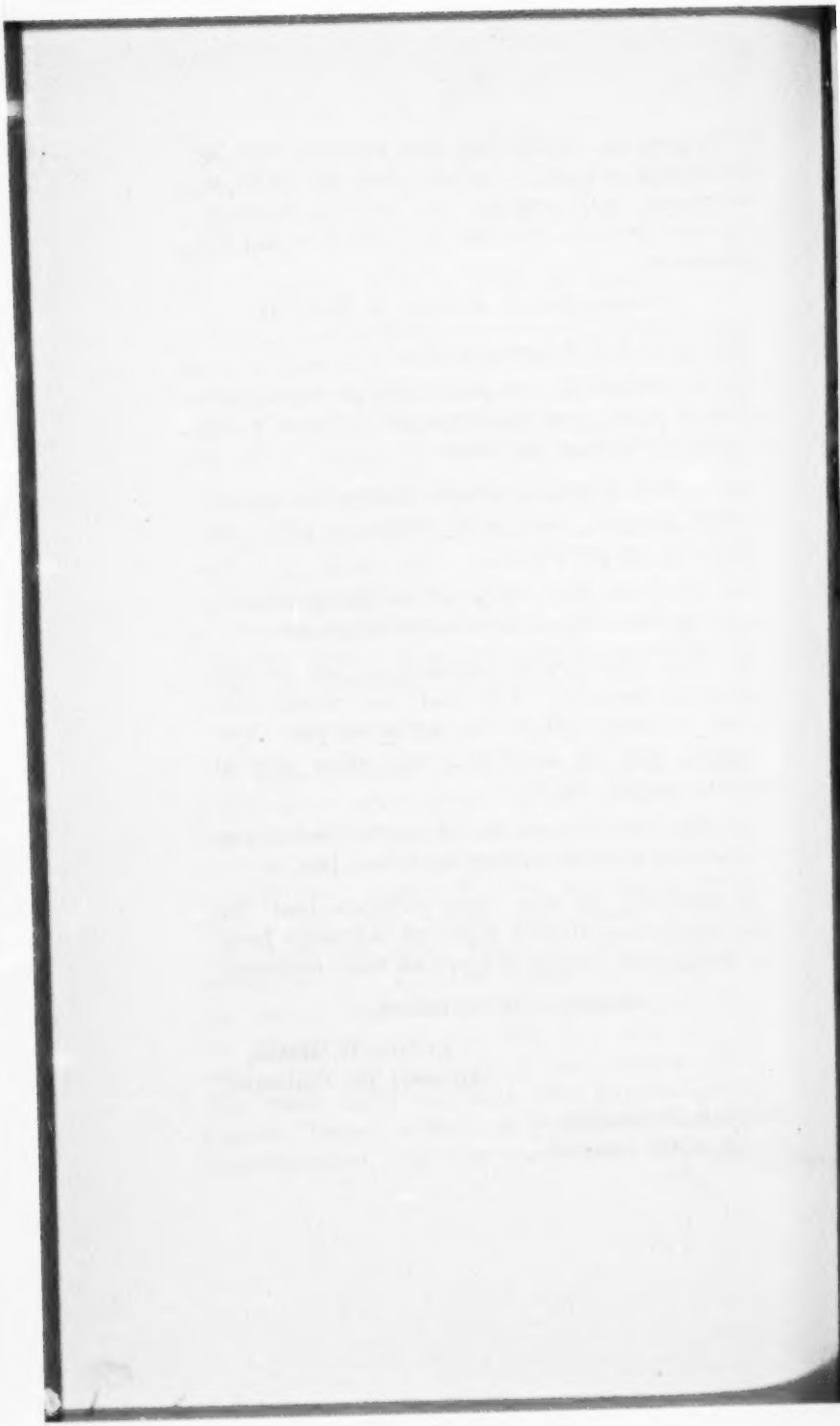

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 200 53

THE UNITED STATES,

Appellant,

against

NEDERLANDSCH-AMERIKAANSCH STOOM-VART MAATSCHTPPIJ (Holland-America LINE),

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES, Appellant, against NEDERLANDSCH - AMERIKAANSCH STOOMVART MAATSCHTPPIJ (Holland-America Line), Appellee.	No. 200

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for Appellee on Reargument.

POINT I.

The case was clearly within the jurisdiction of the Court of Claims.

The Government contends that the payments were tortiously exacted (if not voluntary), and that consequently the Court of Claims had no jurisdiction (pages 18 and 19). At the same time and throughout its brief the Government insists that the payments were made under a statute and also under a contract. Thus in the brief for the

United States in the case of *United States* v. *Holland-America Line*, No. 408, October Term, 1914, expressly adopted and restated by Counsel for the Government in this case, counsel said: "Interpretation is demanded of Section 16 of the Immigration Act of February 20, 1907 (Brief, pp. 20 & 21).

In the *Gibbons* case (8 Wall. 269), which the Government relies upon in support of its plea against the jurisdiction of the Court of Claims, the plaintiff sued to recover the differences between the contract price and the market price of oats, which he had agreed to sell to the Government. The Government had at first refused to accept the oats at the time they were to be delivered under the contract and later its officers required the plaintiff, by threatening to withhold money due him, to furnish the oats. The Supreme Court held that the plaintiff could recover only the contract price. It was said that the plaintiff had the option of delivering the oats and recovering the contract price, or refusing to deliver them at all. No duress was found. The Court said: "But from whatever motive he (the plaintiff) may have consented to renew his agreement and proceeded to its fulfillment, its terms were the same." It is easily seen that no tort was really involved in the action.

See also cases cited in appellee's main brief (pp. 5-10).

POINT II.

In interpreting section 16 of the Immigration Act, the first things to be considered are the fundamental policy and purpose of the Act.

As stated by this Court in the *Head Money Cases* (112 U. S. 580), the purpose of this Act and similar acts "is humane, is highly beneficial to the poor and helpless immigrant and *is essentially to the protection of the people in whose midst they are deposited* by the steamships" (page 591). (Italics ours.)

In furtherance of this purpose, the steamship companies are required to make, at the ports of embarkation, medical and other examinations for preventing the sailing of persons whose admission to this country would be harmful to its citizens.

The steamship companies are also under the statutory duty of providing a duly qualified physician on each ship on which a large number of persons are to take passage and of providing a supply of suitable and necessary medicines.

It is submitted that where these statutory requirements have been complied with, as they were in all the cases involved in this suit, the statutory duties as well as the common law duty of the steamship company were at an end, except with respect to the ordinary duties of a common carrier. It follows that, with regard to the cases of contagious but curable diseases of aliens, arising during the voyage and attributable in no way

to neglect on the part of the steamship company and resulting in no bar to the ultimate admission of such aliens, as were the facts in every instance under present consideration, the steamships company was under no common law or statutory obligation to bear the hospital charges or living expenses of these immigrants after the arrival of the vessel in the port of New York, where it is found, as an undisputed fact, that there were suitable buildings used for the detention and examination of aliens. For the statute expressly provided, "that where a suitable building is used for the detention and examination of aliens, the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners and consignees of vessels bringing such aliens shall be relieved of the responsibility of their detention thereafter until the return of such aliens to their care."

The return of such aliens to the care of the transportation companies thus referred to could only occur where such aliens after detention and examination were found to be disqualified for admission to this country. It is found that there were no such cases among the aliens for whose hospital and other charges during detention in charge of the immigration officials this suit was brought.

POINT III.

The steamship companies bringing steerage passengers to New York had an absolute right to require the Immigration authorities to remove such aliens to Ellis Island for detention and examination.

The Government in its brief (page 15) makes the statement that the immigration officials were expressly authorized by Section 16 of the Act of 1907, to go to vessels and there inspect all such aliens, or they might instead order a temporary removal of such aliens for examination at a designated time and place. But this statement is not a complete nor a fair statement, so far as the Port of New York is concerned, since as already pointed out, it is expressly provided in that Section that where there is a suitable building used for the detention and examination of aliens, the immigration officials shall there take charge of such aliens. In the case of a Port equipped with such a building, which is found to have been the fact at the Port of New York, provision in the Immigration Law for an alternative temporary removal of such aliens is not applicable. That provision applies only where there is no suitable building used for the purposes indicated.

The decisions hold that permissive words in a statute conferring power or authority upon public officers or bodies will be held to be mandatory when the act authorized concerns the public interests or the rights of individuals.

Ralston v. *Crittenden*, 13 Fed. Rep. 508.
Supervisors v. *U. S.*, 71 U. S. 435.
People ex rel. v. *Common Council*, 140 N. Y. 300.
People ex rel. v. *Supervisors*, 51 N. Y. 401.

The above decisions refer only to permissive words. But in the statute in question, the word "shall" is used and no more mandatory or controlling word can be found.

The attitude of the Government is that everything that was to be done was for the benefit solely of the steamship companies. This is a highly prejudiced view of the situation. The public at large are interested in the matter. The public are interested in ocean transportation of freight, passengers and mails, and it is greatly to the public interest that steamship companies shall be able to maintain a regular and reliable schedule of sailings. Ships are not suitable places for the detention and treatment of steerage passengers, and every conceivable consideration points to the desirability of having steerage passengers removed from the vesselsl as soon as they arrive in port, and taken charge of in buildings for their detention and examination, as was clearly contemplated and provided in the statute in question.

POINT IV.

No liability was imposed by the common law upon an ocean carrier to pay such expenses as are involved in this action.

The Government contends at page 16 of its brief that the companies were primarily liable for these expenses. This we deny. The primary liability rests upon the persons benefited, to wit: the steerage passengers themselves. The Govrnment's contention to be sustained must be based either upon the common law, upon a statute or upon a contract. We have in our original brief shown that all the authorities negative the contention that the common law imposes any such liability.

In the absence of a binding usage or special contract with the carrier, steerage passengers are not entitled to be furnished with bedding.

The Centennial, 131 Fed. Rep. 816.
Defrier v. *Nicaragua,* 81 Fed. Rep. 745.

The steamship companies owe a steerage passenger no duty to furnish doctors or medicine other than that imposed by the statutes.

Allan v. *Steamship Co.,* 132 N. Y. 91.

The Federal statutes require a carrier by water to provide a physician and medicines suitable to the voyage in case more than fifty passengers are carried. This clearly shows that no liability was imposed by the common law upon ships to furnish such things. The British Merchant Shipping Act

contains a provision requiring a medical practitioner on a ship carrying fifty steerage passengers, or carrying three hundred persons on board in any case. But the duty to furnish doctors and medicine during the voyage is one thing; any duty involving such service after the end of the voyage is quite another thing.

When Does The Voyage End?

A "voyage" is the transit of the vessel and ends when the vessel is safely moored at her last port of discharge.

The Martha, 16 Fed. Case 860;
The Mary Adelaide Randolph, 93 Fed. Rep. 222.
The Elizabeth, 8 Fed. Cas. 484.
Grannon v. *Hartshorne*, 10 Fed. Cas. 967.

In the case of *The Elizabeth*, *supra*, it is said: "The voyage is ended within the intendment of the maritime law when the vessel is safely moored in the port of discharge and is ready for unloading."

The phrase "end of voyage" when construed literally means the arrival of the vessel.

Bedford v. *Drew*, 46 Mass. 188.

The relation of passenger and carrier continues until the journey has been concluded, and the passenger has left the carrier's premises, or has had a reasonable time to do so.

5 A. & E. Encyclopedia of Law, 497.

POINT V.

No duty to pay such charges was imposed by statute.

The Government in its brief (page 1) asserts that the sums collected from the Appellee were charged under Section 16 of the Act of February 20, 1907. We presume from this statement that counsel for the Government cannot cite any other statute in support of its contention that some language in Federal legislation imposes the duty upon a steamship company of paying these expenses.

The Government's brief sets out fully what it considers the relevant parts of this statute. Leaving out what we contend is irrelevant so far as the Port of New York is concerned, we find the Government's contention that the steamship companies are liable is based upon a provision substantially as follows: "Upon the receipt by the immigration officers at the Port of New York of the lists or manifests of incoming aliens provided for in Sections 12, 13 and 14 of this Act, it shall be the duty of the immigration officials to remove such aliens to a suitable building used for the detention and examination of such aliens, and there take charge of them, and the transportation companies shall be relieved of the responsibility for their detention, unless and until the return of such aliens to their care in cases where such aliens are found not entitled to land."

It would tax one's imagination very severely to find anything in the above language imposing any obligation or duty upon steamship companies

to pay either hospital or other charges of aliens who after the immigration officials have taken charge of them are found entitled to land. The Government says that such language is the basis of the charges which the Appellee was compelled to pay. But instead of imposing upon the steamship companies any liability with respect to the payment of such charges, this language expressly exempts the companies from any such liability, for what can "take charge of such aliens" mean except to take entire responsibility for their care, maintenance and such medical aid as they may require. The declared revival of responsibility of the transportation companies upon the return of undesirable aliens "to their care" necessarily involves the conclusion that such aliens had been in the "care" of the immigration officials from the time those officials took charge of them.

The provision relieving the transportation companies from responsibility for the detention of such aliens thereafter until the return of such aliens to the care of the companies could relate only to such aliens as on examination after detention should be found by the immigration officials to be unfit for admission to the country, for the aliens found to be admissable after being cured would never be returned to the care of the transportation companies, and consequently the responsibility for either their detention or their care by those companies could never revive; but from the moment the immigration officials took charge of them for detention, examination and care, all responsibility of whatever description for these aliens on the part of the transportation companies absolutely ceased.

POINT VI.

No contract existed by which the Appellee was obligated to pay these charges.

The contention is made that the immigration officials could examine steerage passengers on board ship, and that since the exercise of their legal right would cause a loss to the steamship company, it was perfectly lawful for the company to agree, in consideration of the officials removing the passengers from the vessel for examination, to pay the charges in question. If the immigration officials had the right to examine and detain for examination the steerage passengers on board the vessel, and also the right to refrain from so doing, a consideration for a promise made by the steamship company could be worked out, but we have seen that in the case of the Port of New York the officials had no such right, but were directed by mandatory words in the statute to take the passengers from the vessels for detention and examination.

The Government contends, however, that a letter written on December 20, 1909, to the Immigration Commissioner is evidence of a valid contract on the part of the Appellee to pay the charges in question. This letter was written after the Appellee had been notified that its ships would be used as hospitals, unless it agreed to pay the charges in question. Having no choice, it said that it would make payments, but added that such payments should be made without prejudice to its contention that it was not liable for the charges.

The statement was added (under compulsion) that there was no intention to make protests or bring actions to recover such payments. Since the steamship lines had been peremptorily notified that they must agree in advance to make such payments, or have their business seriously hampered and interfered with, there was nothing else for them to do. Stating that they did not intend to protest or bring actions to recover such payments, did not amount to a binding agreement not to bring such actions. We have here a case involving the elementary principle of law that a contract requires a consideration. If they had the right to bring actions to recover payments which they were coerced into making, their statement that they would not bring such actions did not in the least affect their right to bring such actions. There was no estoppel in the matter, since the Government was not misled, and did nothing which would work to its disadvantage on the strength of the statement.

The contracts of carriage entered into between the steamship company and the steerage passengers were not put in evidence in the Court below, and their terms do not appear in the record. It cannot be presumed from this fact that the contracts of carriage imposed any duty upon the steamship company toward a passenger after the voyage ended, or during the voyage, more than the duty required by law.

POINT VII.

The expenses in question were properly incurred in the process of "regulating" immigration.

To "regulate" is defined as, "to adjust by rule or established mode; to govern by or subject to certain rules or restrictions; to put or keep in good order."

The immigrant fund raised by the Head Tax was directed to be used under the statutes for the purpose of regulating immigration. Regulating necessarily involved examination of aliens to decide upon their fitness for entry into the country, and examination required detention. If this detention is lengthened by the illness of a steerage passenger, it is still a part of and incidental to the process of regulating immigration, and consequently should be paid out of the Head Tax money.

The Government might well require aliens who were able, to pay the cost of their maintenance and treatment, since they are the ones primarily liable for such expenses; the steamship company not being liable either primarily or as sureties. The obligation of the steamship company toward the steerage passenger ends with the voyage except in cases where it is required to take the immigrants back to the country from whence they came, because of their unfitness to be admitted to the United States.

While it cannot be disputed that a temporary removal of a steerage passenger for detention and

examination does not constitute a landing, nevertheless the voyage so far as that passenger is concerned has ended, and the duty of the carrier to the passenger has thus been terminated. This is quite a different thing from the statutory duty imposed to carry the immigrant back to his own country if found unfit to be admitted to the United States.

Suppose an incoming steerage passenger has been removed to Ellis Island, or to a public hospital for detention and examination, without anything being arranged between the steamship company and the Government as to who should pay the expenses? It is found that the alien is ill and in need of treatment. In such a case what are the rights of the parties? If under the law the steamship company was liable to pay the expenses of maintenance and treatment of such an alien, no contract was necessary and it could be made to pay at the suit of the Government, if not at the suit of the alien. If it was not liable for such charges, its agreement to pay would be without consideration. Suppose in such a case the Government should say to the steamship company, "It is your duty to pay these charges, and you must agree with us that you will pay them." If the company then made the agreement to pay, on what consideration would such an agreement be sustained?

As the Head Tax money is admittedly more than sufficient to pay these charges, the effect of a decision against the Appellee on the merits will mean that the Government will retain, for general governmental purposes, money collected from

aliens for the purpose of regulating immigration, and the same amount again collected from steamship companies for the same purpose.

POINT VIII.

Various contentions made in this case on the part of the Government are not supported by the record.

The Government contends that the record shows no ruling by the Secretary of Commerce and Labor made in the so-called *Toth* case sustaining the contention of the steamship company (Brief, page 5). The record shows that the Solicitor for the Department wrote to the steamship company giving his own opinion and stating that Secretary Strauss had adopted the views of the steamship companies. The company had a right to rely on this official representation.

It also appears that for some months after this ruling, the Government discontinued the practice of compelling the steamship companies to pay the charges in question, although the Government's brief says that the ruling of Commissioner Strauss was not followed. The charges for which the Government sued in the former action against the Holland-America Line accrued during the months while this ruling was being followed and the steamship companies were not coerced into paying. Certainly this ought to be good evidence that such a ruling was made, and certainly the ruling, if made, was by competent authority as meant in the letter written by the Appellee in 1894 agree-

ing to pay such charges until the case had been decided differently by competent authority.

On Page 15 of the Government's brief the statement is made that the expense in question had to be incurred and paid, and that they could not be paid by the aliens. Why not? It is also said at the same place that there was no authority for the United States to pay it, citing a decision of the Comptroller of the Treasury. The decision of Secretary Strauss may be quoted to the contrary, although neither one of those officials was in a position to make a final decision on what the law of the case then was.

POINT IX.

Upon the main argument and the reargument and the briefs submitted for the Appellee the judgment of the Court of Claims should be affirmed, with costs.

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